

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LESTER E. PATRICK, )  
 ) CIV NO. S-03-2571 GEB JFM PS  
Plaintiff, )  
 )  
v. ) RULING ON IN LIMINE MOTIONS  
 )  
ANTHONY J. PRINCIPI, )  
 )  
Secretary of Department of )  
Veteran Affairs, )  
 )  
Defendant. )  
\_\_\_\_\_ )

On May 17, 2005, Defendant filed a motion in limine.<sup>1</sup>  
Plaintiff filed a response to the motion on May 24, 2005.

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<sup>1</sup> The Final Pretrial Order required that

Any evidentiary dispute capable of being resolved in limine shall be set forth in an in limine motion which shall be filed no later than 4:30 p.m. on May 17, 2005. An opposition or a non-opposition statement to any filed in limine motion shall be filed no later than 4:30 p.m. on May 24, 2005. *Failure to state a basis for admissibility or non-admissibility of disputed evidence constitutes a waiver or abandonment of that basis.*

(Final Pretrial Order filed April 21, 2005, at 2.)

1 Defendant's first in limine motion seeks to prevent  
2 Plaintiff from referencing an Equal Employment Opportunity  
3 Commission ("EEOC") Administrative Judge's ("AJ") finding of  
4 retaliation concerning a position for which Plaintiff applied  
5 ("Second Case") some time after he did not get the position about  
6 which he sues in the instant case. Defendant argues that the AJ's  
7 retaliation finding made in the Second Case involves entirely  
8 different management officials, and should be excluded under Rule  
9 403 of the Federal Rules of Evidence because its probative value is  
10 substantially outweighed by its unfair prejudicial effect.<sup>2</sup>

11 Plaintiff rejoins that the management officials involved  
12 with this federal lawsuit also testified in the second case, and  
13 therefore, the AJ's retaliation finding in the second case may be  
14 admissible under Rule 404(b). But before

15 "other act" evidence is admissible under Rule  
16 404(b) . . . the following test [has to be]  
17 satisfied: (1) there must be sufficient proof  
18 for the jury to find committed the other act;  
19 (2) the other act must not be too remote in  
20 time; (3) the other act must be introduced to  
21 prove a material issue in the case; and (4)  
22 the other act must, in some cases, be similar  
23 to the offense charged. Even if all four  
24 conditions are met, the evidence may still be  
25 excluded if under Rule 403, the probative value  
26 of the evidence is substantially outweighed by  
27 the danger of unfair prejudice.

23 Duran v. City of Maywood, 221 F.3d 1127, 1132-33 (9th Cir. 2000)  
24 (internal citations omitted).

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28 <sup>2</sup> All references to Rules are to the Federal Rules of  
Evidence.

1 Here, Plaintiff has not provided sufficient proof that  
2 any management official said or did anything that underlies the  
3 AJ's retaliation finding in the second case. Therefore,  
4 Defendant's motion on this issue is granted.

5 The record on Defendant's second and third motions is  
6 insufficient for in limine rulings, therefore, those motions are  
7 denied.

8 Defendant's fourth motion seeks to prevent testimony  
9 about what he characterizes as a phantom internet job announcement.  
10 Defendant asserts that "Plaintiff has made much of this 'third  
11 announcement'; but it is nothing but a red herring . . . . By  
12 Plaintiff's own account, the third version of the announcement did  
13 not appear until long after the selection; it is undisputed that it  
14 was not actually used on the selection process." (Mot. at 7-8.)

15 Plaintiff's counter-argument fails to show that the  
16 probative value of the "third announcement" evidence substantially  
17 outweighs Rule 403 considerations. Therefore, the motion is  
18 granted.

19 The record on Defendant's remaining motions is  
20 insufficient for in limine rulings, therefore those motions are  
21 denied.

22 IT IS SO ORDERED.

23 Dated: May 26, 2005

24  
25 /s/ Garland E. Burrell, Jr.  
26 GARLAND E. BURRELL, JR.  
27 United States District Judge  
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